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In The
Supreme Court of the United States
October Term, 1994

William M. Kelley, Joseph S. Rossi, Robert E. Sims, Jeffrey Thompson, Matthew Gramm, John M. Mulloy, Peter Juiris and David M. Gargas,

Petitioners,

vs.

Board of Trustees of the University of Illinois, and Morton W. Weir, Ronald E. Guenther and Karol Kahrs, in their individual capacities, jointly and severally,

Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title IX permits the University of Illinois to eliminate its men's varsity swimming program where males are overrepresented in the athletic program, when their participation rate in athletics is compared to males' representation in the student body as a whole?

2. Whether substantial deference should be given to the regulations and Policy Interpretation implementing Title IX, where Congress delegated authority to effectuate Title IX to the Department of Health, Education & Welfare?

3. Whether the District Court and Seventh Circuit Court of Appeals properly interpreted the regulations and Policy Interpretation effectuating Title IX, which permit the University to eliminate athletic teams of an overrepresented gender to move towards substantial proportionality between the genders in its athletic program as a whole?

4. Whether the University of Illinois' action in retaining the women's varsity swimming program, consistent with the letter and spirit of Title IX, achieves important governmental objectives of eliminating historical gender discrimination against women and is substantially related to the achievement of those objectives, making such action consistent with equal protection guarantees?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of Case	1
Summary of Argument	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases

Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144 (1991) 6

Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) 6

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 4

Favia v. Indiana University of Pennsylvania, 7 F.3d 332 (3rd Cir. 1993) 3,6

Roberts v. Colorado State, 998 F.2d 824 (10th Cir. 1993), cert. denied ___ U.S. _____, 114 S.Ct. 580 (1993) 3,6

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) 3,6

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STATEMENT OF THE CASE

The Respondents wish to supplement the Petitioners' Statement of the Case. Although the Petitioners mention that the Office for Civil Rights of the U.S. Department of Education issued a letter dated March 26, 1982, finding the University to be in compliance with Title IX, they fail to mention certain facts. As recognized by the Court of Appeals in its decision below, the Office for Civil Rights determined that the University of Illinois had denied its female students equal athletic opportunities. (A. 8)*. The Office

*For ease of reference, the citations in this Brief in Opposition are to the Appendix submitted by the Petitioners with the Petition for Writ of Certiorari.

for Civil Rights concluded that the University was not in violation of Title IX by relying on the University's representations that it would remedy the disparity within a reasonable period of time. (A. 8). Female participation in intercollegiate athletics at the University of Illinois, however, continued to be disproportionately low when compared to female undergraduate enrollment. (A. 9).

The decision to reduce the University's athletic program was motivated by budget considerations. (A. 10). The men's swimming program was dropped not because the University determined that "participation rates for female athletes were not as high as they should be" as argued by the Petitioners, but based on an evaluation of that sport against the same seven criteria which were used to evaluate all sports. (A. 10-11). Men's swimming was terminated because, among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and the sport does not have a large spectator following. (A. 11). The women's swimming program was not eliminated because the University's legal counsel advised that such action would put the University at risk of violating Title IX. (A. 11-12).

SUMMARY OF ARGUMENT

Certiorari should not be granted in this case because the Seventh Circuit's decision does not conflict with the decision of any other United States Court of Appeals. Rather, its decision is consistent with the decisions of other appellate courts. Moreover, the Seventh Circuit's decision does not conflict with decisions rendered by this honorable Court, but is also consistent with them.

The decision of the Seventh Circuit is also consistent with the letter and spirit of Title IX. The Petitioners' argument that the Seventh Circuit's decision conflicts with the plain meaning of the statute is over simplistic and ignores the history and intent behind Title IX. The Seventh Circuit followed the regulations and Policy Interpretation under Title IX, which are consistent with the guarantees of the Equal Protection Clause.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND WITH CASES DECIDED BY THIS HONORABLE COURT

Three United States Courts of Appeals have considered Title IX's application to intercollegiate athletics, in addition to the Seventh Circuit's decision in this case. In *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir. 1993), the Third Circuit affirmed the district court's refusal to modify a preliminary injunction, concluding that the university could not replace its women's gymnastics program with a soccer program even though the net effect would be to move the university towards Title IX compliance, because women remained underrepresented in their proportionate share of athletic opportunities. In *Cohen v. Brown University*, 991 F. 2d 888 (1st Cir. 1993), the First Circuit specifically held that a university need not add athletic teams for the underrepresented gender to meet Title IX's requirements. Universities also have the option of moving towards compliance with Title IX's substantial proportionality test by reducing opportunities for the overrepresented gender, while keeping opportunities stable for the underrepresented gender. 991 F.2d at 898, Note 15. In *Roberts v. Colorado State*, 998 F.2d 824 (10th Cir. 1993), cert. denied ____ U.S. ____, 114 S.Ct. 580 (1993), the 10th Circuit recognized "that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletic programs. . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population." 998 F.2d at 830. The court explained its holding in a related footnote, as follows:

> Title IX does not require that a school pour ever increasing sums into its athletic establishment. If a university prefers

> to take another route, it can also bring itself into compliance with the first bench mark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent). 998 F.2d at 830, Note 9.

The Seventh Circuit's decision is consistent with these other circuit court cases.

Moreover, the Seventh Circuit's decision does not conflict with any decisions rendered by this Court. This case is very different than the Title VI case of *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), despite what Petitioners might think. In *Bakke*, the University of California, on its own, developed a student admissions policy that granted a racial preference to minority applicants. In the case before this Honorable Court, the University of Illinois did not grant preferential treatment to women. Any determination granting such a preference was made by the Department of Health, Education & Welfare when it promulgated the regulations implementing Title IX (A. 64-109), and the Policy Interpretation of Title IX, which were applied by the Seventh Circuit and have become the touchstone for measuring Title IX compliance. The University was simply following the letter and spirit of the law. Consequently, *Bakke* is not an appropriate analogy.

Moreover, this case does not involve a set aside program, which was at the heart of the *Bakke* case. There, the University of California reserved a certain number of seats in the incoming class exclusively for minority applicants. Here, on the other hand, the University of Illinois has not set aside a specific number of athletic participation opportunities for women. Gender was only one factor in the University's decision, and then only to the extent that it protected the women's swimming program from elimination (A. 11-13). *Bakke* recognizes that race may be one of many factors used in making admissions decisions but it may not be the only factor. Gender was only one of many factors, in the sense that the underrepresentation of the women protected their program from elimination, making this case consistent with *Bakke*, if this Court's decision in that case is considered by analogy, which the Respondents

believe would be inappropriate.

The Petitioners' comparison of athletic programs to "other programs like home economics or mathematics" (Pet. 13), is also flawed. As stated by the Seventh Circuit, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." 35 F.3d at 270. Congress recognized that athletics is different and the Petitioners should, too. In academic pursuits, students of both sexes compete against one another, while the same is not true in athletics.

The Petitioners' argument that they were discriminated against under Title IX implicitly incorporates a definition of discrimination that is much too broad. In effect, their argument is that the men and women were treated differently, and gender was taken into account, when the women's swimming program was not eliminated. Taking the Petitioners' argument to its logical extreme, having separate teams for men and women would constitute discrimination because the sexes would be treated separately, and differently because gender would be taken into account in the process of establishing and maintaining separate teams. This position is, of course, ludicrous. The University of Illinois did nothing more than take gender into account in an effort to allocate athletic opportunities equitably between the sexes in its intercollegiate athletic program as a whole. Equitable distribution of athletic opportunities should not be considered discrimination under any definition.

II. THE DECISION BY THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH THE PLAIN MEANING OF TITLE IX

The Petitioners would have this Court look at only the language of Title IX, without considering the language of the regulations and Policy Interpretation promulgated thereunder, and also would have this Court disregard the case law developed under Title IX. Where, as here, Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, those regulations must be given considerable deference. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, the courts must defer to an agency's interpretation of its regulations if the

interpretation is reasonable, *Martin v. Occupational Safety & Health Review Commission,* 499 U.S. 144 (1991), a standard the Policy Interpretation meets. The Seventh Circuit upheld the regulations and Policy Interpretation, as have all the other appellate courts that have considered them. *Favia v. Indiana University of Pennsylvania,* 7 F.3d 332 (3rd Cir. 1993); *Cohen v. Brown University,* 991 F.2d 888 (1st Cir. 1993); *Roberts v. Colorado State,* 998 F.2d 824 (10th Cir. 1993). The Petitioners would have this Court depart from that settled precedent and ignore the established legislative history and recognized intent behind Title IX.

As the First Circuit determined in *Cohen v. Brown University,* Congress wanted to create "a more level playing field for female athletes. . . ." 991 F.2d at 894. The Title IX regulations and Policy Interpretation are aimed at doing just that: protecting the interests of the underrepresented gender, which is the women athletes at the University of Illinois. It is truly ironic that the Petitioners claim the protection of Title IX since they are not even members of the class sought to be protected, the underrepresented gender. It is the fact of underrepresentation, not gender, that is critical in evaluating Title IX cases.

Futhermore, Title IX and the regulations and Policy Interpretation are consistent with the Fourteenth Amendment's equal protection guarantees. Congress has broad powers under the Fifth Amendment to remedy past discrimination. *Metro Broadcasting, Inc. v. Federal Communications Commission,* 497 U.S. 547 (1990). Removal of gender discrimination in athletic programs in higher education is certainly an important governmental objective. The scheme established in the regulations and Policy Interpretation for remediating the present effects of past discrimination is substantially related to that objective and, consequently, does not violate the Equal Protection Clause. *See Cohen v. Brown University*, 991 F.2d at 900-901.

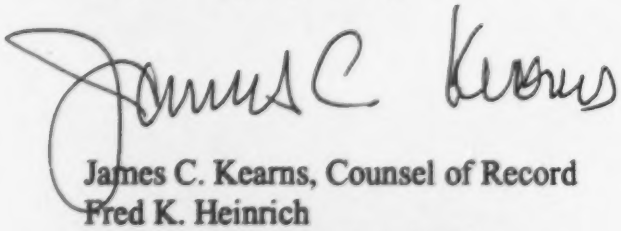
The University decided not to eliminate the women's swimming team based on the fact that women were underrepresented in its athletic program. The Petitioners would have this Court rule that the University's decision to eliminate the men's swimming program was a violation of Title IX, despite the fact that men were overrepresented in the athletic program and

remained overrepresented even after elimination of that team. If the Petitioners' argument is adopted, universities across the country will be foreclosed from eliminating any athletic teams. Their hands will be tied since they will be prevented from eliminating teams of both the underrepresented and overrepresented gender, if the Petitioners' argument is accepted. This would result in preservation of the status quo, which is certainly not the intent behind Title IX.

CONCLUSION

For the reasons stated above, the Respondents request this Honorable Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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